United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2493,94,95

To be argued by
PETER A. CLARK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2493, 74-2494, 74-2495

UNITED STATES OF AMERICA

Appellee,

—v.—

HAROLD SIMMONS, JAMES HASKINS,
and MICHAEL ALSTON

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Questions Presented

I. Did the Court abuse its discretion in denying motions for severance and mistrial made after the Court ruled that cross-examination by counsel should precede that of the pro-se defendant?

II. Did the Court abuse its discretion in denying motions for severance and mistrial by Haskins and Alston based on the claim that they were prejudiced by the unruly behavior of the pro-se defendant Simmons?

III. Did the Court err in denying defendants' motions made under the Jury Selection and Service Act to strike the jury panel and for supplemental order?

IV. Was the Government affidavit denying electronic surveillance sufficient to obviate the need for a hearing on defendants' conclusory and piecemeal motions to suppress unlawful electronic surveillance?

Statutes Involved

18 USC § 2113(a)

Whoever, by force and violence, or by intimidation, takes . . . from the person or presence of another . . . any . . . money . . . belonging to, or in the care, custody, control, management, or possession of, any bank . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

18 USC § 2113(b)

Whoever takes . . . with intent to steal . . . money . . . exceeding $100 belonging to, or in the care, custody, control, management or possession of any bank . . . shall be fined not more than $500 or imprisoned not more than ten years, or both.

18 USC § 2113(d)

Whoever, in committing . . . any offense defined in subsections (a) and (b) of this section assaults . . . or puts in jeopardy the life of any person by the use of a dangerous weapon . . . shall be fined not more than $10,000 or imprisoned not more than twenty five years, or both.

Rule 14, F.R.C.P.—Relief from Prejudicial Joinder

If it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together . . . the court may order . . . a severance of defendants or provide whatever other relief justice requires.

18 USC § 3504—Litigation concerning sources of evidence

(a) In any trial . . .

(1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act . . . the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

28 USC § 1861—Declaration of Policy

It is the policy of the United States that all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 USC § 1862—Discrimination Prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin or economic status.

28 USC § 1863—Plan for Random Jury Selection

(a) Each United States district court shall devise and place into written operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title . . .

(b) (1) . . .

(b) (2) [Among other things, such plan shall . . .] specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title . . .

United States Court of Appeals

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Docket Nos. 74-2493, 74-2494, 74-2495

UNITED STATES OF AMERICA

Appellee,

—v.—

HAROLD SIMMONS, JAMES HASKINS, and MICHAEL ALSTON

Defendants-Appellants.

BRIEF FOR THE APPELLEE

Statement of the Case

These are appeals from judgments of conviction in the District of Connecticut entered by the Court (Newman, *J.*) on November 13, 1974, after jury verdicts of guilty on October 23, 1974. Appellants have filed separate briefs and the Government has consolidated its responses in one brief. Appellants adopt each other's issues and arguments, with the exception of Appellant Simmons, who proceeds only on a challenge to the jury selection process after concluding there was no other error.

On June 20, 1974, a grand jury in New Haven, Connecticut returned a four count indictment (Criminal No. N-74-65) charging Harold Simmons, James Haskins, Michael Alston and Timothy Adams with armed bank robbery, aiding and abetting, and conspiracy. Defendant Adams was at that time a fugitive and remained so until after trial.

On June 28, 1974, appellants Simmons, Haskins and Alston stood mute at plea, and not guilty pleas were entered on their behalf by the Court. Pre-trial motions, including motions to strike the jury panel and to suppress evidence derived from unlawful electronic surveillance were filed, suppression hearings were held beginning September 18, 1974, and jury trial began on September 24, 1974. At the conclusion of the evidence the Court withdrew count four (conspiracy) from the jury. Verdicts of guilty as to all defendants on all remaining counts were returned on October 23, 1974.

On November 13, 1974, appellants Simmons, Has' Alston were each sentenced to terms of imprisonn. twenty-five years.

Statement of Facts

The Robbery

On May 3, 1974, the Westville branch of the New Haven Savings Bank was robbed at gunpoint by several black males, who took over $10,000 (Tr. 1612), including bait money. (Tr. 1504) As the robbers exited the bank, Police Officer Willie Bradley was arriving in response to an alarm (Tr. 1061, 1062) triggered by the bank manager. (Tr. 1506) He was gunned down in the street by shotgun fire in front of the bank (Tr. 1064).

Jeffrey Luciani testified that as this happened he was about to enter the bank and observed four black males run past him (Tr. 1405) with some of them firing at a police officer (Tr. 1406). All four fled in a yellow cab (Tr. 1407) which had been hi-jacked at gunpoint from the driver earlier in the day. (Tr. 1111-1113) Luciani identified Haskins and Alston as being two of the men he had seen running from the bank to the cab. (Tr. 1409)

The cab was pursued by several police cars converging on the area (Tr. 1411) and was finally abandoned on George Street (Tr. 2072, 2073). The occupants fled in several directions. Officer Caccioli observed one black male carrying a shotgun enter the house at 703 George Street (Tr. 2074). Several officers entered the home to investigate (Tr. 2087), and another gunfight ensued (Tr. 2089). One more officer was wounded (Tr. 2092). Eventually Haskins and Alston surrendered (Tr. 2096) along with a hostage later identified as Lawrence Silva, a resident of the house (Tr. 1962). Silva testified that two armed men had entered his home and had held him at gunpoint (Tr. 1964). He identified Haskins as one of them (Tr. 1965).

After the arrests, the house was searched and the following items were found: two sawed-off shotguns; two pistols; a large quantity of live ammunition for the weapons; and many spent cartridges. (Tr. 2123, 2124) A bag of money containing over $10,000 (Tr. 2148), including thirty bait bills (Tr. 2156) was also recovered hanging on a fence outside of the house (Tr. 2036-2038).

Meanwhile, officers searching the area apprehended Simmons hiding in a bathroom in a medical building around the corner (Tr. 1870, 1871). Two more pistols, numerous rounds of ammunition, and a green knapsack were recovered in the bathroom, (Tr. 1875). The knapsack was the same type as one carried by one of the robbers (Tr. 1453).

Another team of officers at the bank found a crude map which had been dropped by one of the robbers (Tr. 1708) which bore a fingerprint of Harold Simmons (Tr. 1708). Located with the map was a photo identification card bearing the name George Parkerson and the photo of Simmons (Tr. 1706).

A parade of bank customers and employees identified various combinations of the defendants. Eugenie Comkowicz saw four black men in or near a taxi outside of the bank

just prior to the robbery (Tr. 1120) and was able to identify Alston (Tr. 1121). Deborah Ciaburri saw some black men near the taxi (Tr. 1237) and stood near a robber in the bank (Tr. 1237) whom she identified as Haskins (Tr. 1238). Bank employee Frances McCarthy identified Alston as the robber nearest her, carrying a sawed-off shotgun and wearing an Army fatigue jacket (Tr. 1274-1277). Customer Ernest Rawden described one of the three robbers he saw as wearing an Army jacket and carrying a sawed-off shotgun (Tr. 1304-1307), and identified Haskins as that man (Tr. 1315). Tellers Diane Tokarz and Elizabeth Lawler, respectively identified Alston (Tr. 1351) and Haskins (Tr. 1397) as being among the robbers. Customer Anthony Gambardella identified Simmons as the robber with a pistol who was behind the counter in the area where the map and identification card had been found (Tr. 1442-1448) He also identified Alston as one of the robbers carrying a shotgun (Tr. 1450). Finally, employee Ralph Cimmino saw two black men in Army jackets near him, at least one of whom was carrying a shotgun (Tr. 1463), and he identified Haskins and Alston as these men (Tr. 1465).

The fourth robber, subsequently identified as Timothy Adams, escaped pursuing officers after fleeing the abandoned taxi (Tr. 2152).

The Trial

During pre-trial suppression hearing, appellant Simmons undertook to represnt himself (Tr. 475) and the Court instructed his public defender to remain as an advisor (Tr. 478). The hearings proceeded with the order of cross examination differing from witness to witness, and the trial started with this method. At the end of the second day of trial the Court ordered that members of the bar i.e. counsel representing Haskins and Alston, cross examine before the pro se defendant (App. 1-3). The preference was then to have Simmons go first, but this was denied. At the start

of the next session of court, appellants then proposed that the lawyers cross examine before and after Simmons, which proposal was also rejected (App. 4-6). Haskins and Alston then moved for mistrial and severance (App. 7-8).

Similar motions were made and denied at two other points during this lengthy and often tumultuous trial. The first occurred as a result of an exchange between Simmons and the Court in the presence of the jury (App. 9-12). The jury was excused for a short recess, immediately after which they were instructed to disregard the incident both as to Simmons and his co-defendants (App. 13-14).

Later in the trial Simmons engaged in another outburst which was wholeheartedly joined by Haskins and Alston (App. 15-18). Simmons was thereupon ejected from the courtroom and temporarily lost the right to represent himself. Shortly thereafter, during a recess, Haskins and Alston voluntarily elected to join Simmons in the lock-up and waive their presence in the courtroom (App. 19-21). Counsel for Haskins and Alston then moved for a mistrial and severance on the basis of Simmons' behavior before the jury (App. 22). The motions were denied and upon resumption of the trial the jury was instructed, at the request of all counsel, that all defendants had waived their right of attendance and that the disruption did not bear on the issues in the case (App. 23-25). Nothing further of significance to this appeal occurred during the remainder of the trial.

ARGUMENT

I.

The trial Court properly exercised its discretion in denying Haskins' and Alston's motions for mistrial and severance based on its requirement that cross-examination by members of the bar precede that of the pro-se defendant, which requirement was designed to insure that the bounds of relevance be maintained to the greatest extent possible, to avoid undue delay, and to protect the rights of the pro se defendant.

Appellants' contentions with respect to the order of cross-examination are frivolous arguments in support of a manufactured issue. During argument on the order, counsel for Haskins correctly asserted that the Court had the *power* to allow counsel to precede and follow the pro-se defendant, thereby recognizing the Court's wide discretion in such matters. *A fortiori,* the Court was likewise empowered to require a different order. Courts have great latitude in managing the mechanics of a trial, including requiring defendants to proceed in prescribed order. *DeVault* v. *United States,* 338 F.2d 179 (10th Cir.) 1964.

The Court's discretion was wisely exercised here not only in an effort to contain the trial within some reasonable bounds of relevance, but also to assist the pro-se defendant by preceding him with examples of appropriate areas of inquiry for each witness. Furthermore, the Court made this ruling after several days of testimony and cross-examination in differing orders by counsel and the pro-se defendant, not arbitrarily as soon as Simmons undertook his own defense. As the Court pointed out, counsel had been and were free to object to Simmons' lines of inquiry, but no objections were interposed before or after the motions for mistrial and severance. In addition, counsel were free to pursue proper cross-examination of their own re-

gardless of whether or in what order Simmons inquired. That defendants lost no substantive nor procedural rights nor was their defense in any way prejudiced.

The ruling on cross-examination being an unquestionably necessary and proper exercise of discretion, there was no conceivable basis for mistrial or severance at this juncture and the motions were appropriately denied.

II.

The trial Court properly exercised its discretion in denying Haskins' and Alston's motions for mistrial and severance based on the unruly behavior of co-defendant Simmons.

Even if Simmons was the villain of the three defendants' courtroom behavior was almost equally reprehensible, and is misleading, and improper to consider Simmons' behavior alone. Motions for mistrial and severance are addressed to the sound discretion fo the trial court, and are reviewable only for abuse. *United States* v. *Jenkins,* 496 F.2d 57, 68 (2d Cir.) 1974, *cert. denied,* — U.S. — (1975); *United States* v. *Projansky,* 465 F.2d 123, 138 (2d Cir.) 1972, *cert. denied,* 409 U.S. 1006 (1973); *United States* v. *Borelli,* 435 F.2d 500 (2d Cir.) 1971. Substantial prejudice, as opposed to simply a better chance of acquittal, must be shown before severance is mandated. *United States* v. *Calabro,* 467 F.2d 973, 987 (2d Cir.) 1972, *cert. denied,* 409 U.S. 926 (1973); *United States* v. *Marshall,* 458 F.2d 446 (2d Cir.) 1972. The contumacious conduct of a co-defendant does not constitute such prejudice. *United States* v. *Marshall, supra; United States* v. *Bamberger,* 456 F.2d 1119 (3d Cir.) 1972, *cert. denied* 413 U.S. 919 (1973); *United States* v. *Bentvena,* 319 F.2d 916 (2d Cir.) 1963, *cert. denied sub nom Ormento* v. *United States,* 375 U.S. 940 (1964). These insults to the dignity of our courts run

the gamut from assaults on jurors and prosecutors to vilification of co-defendants, and even include the eating of trial exhibits (*Bamberger*).

Surely if sufficient prejudice were not found in these instances to necessitate severance or mistrial, the showing here, pales by comparison. Here, the co-defendants now seeking redress underwrote Simmons disruptive efforts at trial by staging a walk-out with him.

Furthermore, the Court carefully and frequently instructed the jury that each case was separate, that the antics of one should not prejudice the others, and that in no event should any outbursts be considered by the jury as bearing on the ultimate issues. In addition, the evidence against each of the appellants was so devastatingly conclusive that conviction would have resulted in any event, whether tried separately, with or without disruption. *United States* v. *Marshall, supra,* at 458.

Appellants also contend that Simmons pursued prejudicial lines of questioning with no specification in their briefs, and without showing objections made and overruled. As the trial Court advised during argument on the order of cross-examination, they were entitled to object if they deemed it appropriate; however, they chose not to. Their absence of objection below forestalls their claiming this issue now. *United States* v. *Calabro, supra; United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir.) 1965, *cert. denied,* 383 U.S. 907 (1966).

III.

The jury selection process utilized in the New Haven Division of the District of Connecticut satisfies in all respects the Requisites of the Jury Selection and Service Act.

The specific question of the validity of the jury selection procedures in effect in New Haven has been put to rest. Although counsel here adopted the record of *United States* v. *Gonzalez,* Criminal Number B-115 (D. Conn., May 22, 1974) for purposes of the issues and data presented therein, apparently in the belief that the claims there offer a new twist to the presentation in *United States* v. *Jenkins,* 496 F.2d 57 (2d Cir.) 1974, *cert. denied,* — U.S. — (1975), two developments have taken place since *Jenkins* and *Gonzalez* which should end the matter. First, certiori has been denied in *Jenkins.* Secondly, in *In Re Grusse and Turgeon,* Civil No. N-75-42 (D. Conn., February 19, 1975), the jury selection practices in New Haven were once again upheld by Judge Newman, relying specifically on *Jenkins* and *Gonzalez,* and that opinion has itself been affirmed in this Court on February 27, 1975. *In Re Grusse and Turgeon,* — F.2d — (2d Cir.) 1975.

IV.

The Government's denial of electronic surveillance, making reference to all of the appropriate agencies and supplemented by inquiries of four state and local police departments, was sufficient to foreclose further inquiry on the basis of the conclusory and piecemeal allegations of appellants' motions to suppress.

Appellants, on appeal, seek to expand their attack on the scope of the Government's search for electronic surveillance. It must stop somewhere. Their initial motion was filed on the second day of the pre-trial hearings. (September 19, 1974) The Government, despite the lateness of the request, immediately initiated an inquiry by the Department of Justice to the standard agencies.[1] An affidavit of the trial Assistant United States Attorney, to which was annexed the original replies, was filed on November 1, 1974. A supplemental response was filed on January 21, 1975, indicating that various state and local agencies had been inquired of and had responded that appellants had not been the subject of electronic surveillance. Their responses were similarly appended.

The Government acknowledges that a mere allegation of surveillance requires it either to affirm or deny the existence of same. *United States* v. *Toscanino*, 500 F.2d 267, 281 (2d Cir.) 1974. The denial must be in affidavit form, indicating what agencies have been checked. This is precisely what was done in this case. *Toscanino* relies on four cases to support the requirement of denial,[2] all of

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[1] F.B.I., Secret Service, Bureau of Alcohol, Tobacco & Firearms, Internal Revenue Service, Customs Service, Drug Enforcement Administration, and Postal Service.

[2] *Beverly* v. *United States*, 468 F.2d 732 (5th Cir.) 1972; *In re Horn*, 458 F.2d 468 (3d Cir.) 1972; *In re Grumbles*, 753 F.2d 119 (3d Cir.), *cert. denied*, 406 U.S. 932 (1971); *In re Marx*, 451 F.2d 466 (1st Cir.) 1971.

which approve affidavits of substantially less specificity and substance than here. Furthermore, the check here of local agencies is seemingly surplusage, inasmuch as no case has been found requiring the Government to search the indices of local law enforcement agencies.

Appellants now contend, however, that in light of recent public disclosures the CIA should be checked. While there may be some precedent for requiring a CIA check, *United States* v. *Huss,* 482 F.2d 38 (2d Cir.) 1973, there was at least some reason to anticipate that agency's interest in the matter under investigation there in view of the foreign ties of the organization to which defendants belonged and the foreign aspect of the bombed offices. Here we have a simple case of bank robbery, solved immediately by almost instant capture and proved by eye witnesses. Not one half-way plausible factor, including recent disclosures, would provoke even the wildest speculation that the CIA could be involved in this matter. See *United States* v. *Ahmad,* 347 F. Supp. 912, 935 (M.D. Pennsylvania) 1972, affirmed in part, reversed in part, sub nom. *United States* v. *Berrigan,* 482 F.2d 171 (3d Cir.) 1973; see also footnote 2, Judge Lumbard's concurring opinion, *In re Grusse* and *Turgeon,* — F.2d — (2d Cir.) 1975, wherein it is suggested that the scope of the Government's denial may, to some degree, be geared to the specificity of the movant's allegations. Further support for this view is found in *United States* v. *Veilguth,* 502 F.2d 1257 (9th Cir.) 1974, upon which appellants rely for the proposition that a mere allegation is sufficient to require a response. The Government agrees, although *Veilguth* noted that "The *Alter*[3] court did not hold, however, that a more general 'claim' would not have been sufficient to require the Government to file a response *appropriate to such a claim.*" emphasis supplied. The difficulty of "proving the negative" in the absence of specific

[3] *United States* v. *Alter,* 482 F.2d 1016 (9th Cir.) 1973.

allegations of Government wrongdoing was also recognized in *In re Weir*, 495 F.2d 879, 881, (9th Cir.) 1974. As Weir points out, a practical approach should be taken.

Here, no suggestion was made below by appellants that they charged CIA involvement. Presumably counsel were aware of the nature of appellants' activities, yet their main concern was the New York City Police Department, asking only that "some kind of report from the Government on inquiries made of the New York City Police Department" be filed. (App. 26). They also recognized that "the prosecution cannot be expected to search the records of every law enforcement agency in the world" (App. 27). Finally, after the Government represented unequivocally that it had presented no evidence of any kind received from the New York City Police Department (App. 28-29), counsel indicated that "we are not looking here for wholesale inquiry into any large number of agencies or asking the Government to discover agencies and make an investigation. We are concerned with one agency, which whether or not in the Government's view, certainly in our view, is probably the most likely to be involved in illegal wire tapping of our clients." (App. 29)

Yet, despite these claims, they now seek, in a case obviously consisting only of eye witnesses' testimony to a simple albeit brutal domestic crime, to go to the well again and inquire of the CIA, claiming recent public disclosures necessitate a return to the District Court.

The scope of these "disclosures" has been distorted by omission in appellants' brief. CIA has disclosed the utilization of 21 domestic wiretaps between 1950 and 1965, most of which were directed against employees of the Agency. They ceased ten years ago, long before any appellant claims an association with the Black Liberation Army. Nothing in the current disclosures would lead one to believe the CIA

has or is currently investigating bank robberies. In short, this is nothing more than a last ditch attempt, with no foundation in fact or even reasonable inference, to have the Government jump through one more hoop.

CONCLUSION

Appellants, despite their disruptive efforts, received a fair trial completely free of error, and it is respectfully urged that the decision of the District Court be affirmed.

Respectfully submitted,

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APPENDIX

(1354) * * *

Q. Were you aware of when they left the bank? A. I got up when I heard the shots outside.

Q. Shots were outside your bank? A. Yes, they were.

Q. Do you recall approximately how many you might have heard? A. I couldn't tell you how many I heard, no.

Q. It was more than one? A. Yes, there were a few.

Mr. Clark: No further questions.

The Court: Is the system being changed again?

Mr. Williams: Yes. We decided during the recess upon a firm policy which we will follow in all cases to avoid confusion in the future. Mr. Simmons will be the first to cross-examine in every case.

The Court: I don't think that's the order that I am going to entertain. If counsel wants a firm order, which I think I agree with you is a useful way, it would be far more helpful to the Court to have the initial examination be done by someone who is a member of the Bar, because I think that's the most likely way to have an expeditious handling of it, so you can (1355) resume your seat, Mr. Simmons, and we will then revert to the order we had used, which, I guess, makes Mr. Williams first up.

Mr. Williams: If it please the Court, I note it's ten to 5:00, and in view of your Honor's ruling, I would ask that we suspend for the day, because it's going to require some consultation among counsel, and it's also going to require the submission of probably some briefs to the Court. I don't believe there is any authority for your Honor's ruling. I think it's unfair.

The Court: I will look at your briefs when I get them. Until then, you may cross-examine now if you

wish to. Do you have any cross-examination, Mr. Williams?

Mr. Williams: I'm having a consultation. I hadn't expected that I was going to be first. If it please the Court, I'd think the fairest would be the order they are listed in the indictment, rather than arbitrarily put me first.

The Court: I am not arbitrarily putting you first. I am putting you first, because, unlike one of the other cases we have got here, you are a member of the Bar and one of the other defendants is not, and (1356) that's why I'm not going to proceed with him. If you and Mr. Rosen have a difference as to who should be the initial cross-examiner, I will be glad to order that in any way you like.

Mr. Williams: I will, as I always do, submit to your Honor's ruling, but would like the record to note I do so under protest. I think this is extremely unfair to all the defendants in the case.

The Court: As to you and Mr. Rosen, is there any preferred order of examination?

Mr. Williams: Not particularly. If I may have one moment, your Honor.

Cross-examination by Mr. Williams:

Q. How long have you worked at that bank, ma'am? A. Five years.

Q. In that same branch? A. Yes.

Q. How old are you? A. 22.

Q. Same age as the manager of the branch, I believe, is that correct? A. I have never asked his age.

* * * * *

Trial Testimony

(1374) * * *

The Court: Was the pillowcase. S-1 is marked as the photograph of the identification card.

Defendant Simmons: That came to my attention after the stipulation was signed.

The Court: There is no sense arguing it at the moment. If there is not a stipulation, then counsel will have to see if there is some basis on which they can stipulate. We have got a jury waiting, and we are not going to try to negotiate a stipulation in open court.

If there is something that can be agreed upon, fine; and if not, we will proceed otherwise.

Ready for the jury?

Mr. Williams: If your Honor please, there is one other matter I would like to take up apropos of our discussion at the end of the business yesterday. I would like to propose, if your Honor will permit, that I be permitted in all cases to be the last person to cross-examine. I understand your Honor's feeling that you want an attorney to go first in cross-examination. I think for the same reasons I am very concerned on—as far as doing my duty to my client is concerned, that I have an opportunity to cross-examine after Mr. Simmons, because areas have a tendency to get opened up during his cross-examination with witnesses which I feel I have a duty to my client to go into (1375) to some extent in order to resolve whatever problem may have developed during the course of that.

Therefore, I would respectfully request permission to cross-examine last of the three. If Mr. Rosen goes first, that's fine as far as I'm concerned.

The Court: It seems to me that's still not an appropriate way to handle a pro se defendant, to have him undertake to open up things in advance of

lawyers who are trained to handle cross-examination, who have a far more sophisticated sense of relevancy. It seems to me it puts—it's an imposition on the pro se defendant, and I think it's inappropriate for the Court, for lawyers, to try to position themselves in the line of cross-examination after an untutored, untrained pro se defendant.

Mr. Williams: What we are trying to do is position ourselves on both sides of the untutored pro se defendant in order that our clients may be fully protected from any problems which may accrue to them.

The Court: Your clients will be fully protected by your making a cross-examination, whether Mr. Simmons was in the case or not. You don't need added protection because he cross-examines.

Mr. Williams: If your Honor please, I think that the record in this case is clear that new areas have been opened up by pro se cross-examination.

(1376)

The Court: If there is something that on which you are entitled to pursue, you will be allowed to pursue it, no matter what the order is.

Mr. Williams: The problem is, quite frankly, as I understand the Court's ruling yesterday, when areas that are opened up that may be potentially damaging, the Court does not permit us to go back into those areas if it's an area that's been touched upon——

The Court: I heard nothing yesterday that was brought out by Mr. Simmons that was damaging to your client. If you thought there was something damaging in the way he cross-examined, you, of course, were free to object, and I heard no objection from you in the course of his examination.

Mr. Williams: If it please the Court, I think that as a practical matter, the Court is placing an

intolerable burden on the co-defendants in this case by not allowing counsel to both proceed and follow. If the Court so rules, the Court so rules, but I think that anybody who has ever tried a case knows the kind of problems we can get into here and knows that it's simply not sufficient for counsel for one co-defendant to stand up and object when somebody on behalf of another co-defendant is asking a question.

The Court: It happens all the time. There is nothing novel about that at all. If you prefer not to, that's your choice, but it happens all the time.

(1377)

Mr. Williams: I certainly think that the Court has the power to allow counsel to precede and follow, I think there is no excuse for failing to do so, that would be recognizable in the law.

The Court: You will have to give me some law opposed to it before you assert general proposition of what the law——

Mr. Williams: We understand why the Court won't allow it.

The Court: I won't allow it because I believe it to be in the best interests of the pro se defendant, to have cross-examination opened up initially by those trained in the law in an effort to expedite the matter and to keep the cross-examination relevant and to minimize prejudice to all concerned. Those are my reasons. I will allow counsel who are members of the Bar to agree among themselves which one will precede the other, but both will precede the pro se defendant. I think that's far the preferable course, and I think the experience has demonstrated that.

Mr. Williams: I strenuously object.

Mr. Rosen: I join in Mr. Williams' objections, and essentially on the basis of them, on behalf of Mr. Alston, I move for a mistrial.

Mr. Williams: I move for a mistrial.

The Court: Motion denied.

Mr. Williams: I move for a severance.

(1378)

The Court: For what reason?

Mr. Williams: For the reasons which I have explained in my argument——

The Court: Because of the order of cross-examination?

Mr. Williams: Because your Honor's ruling with respect to the order of cross-examination, in my judgment, makes it impossible for the defendant I represent to obtain a fair trial in a joint situation.

The Court: The motion for severance on that ground is denied.

Mr. Rosen: Your Honor, I join in that motion, as well.

The Court: The motion is denied as to your——

Mr. Rosen: Rather than joining in, I make it on behalf of my client.

The Court: It's denied as to your client, as well.

Are we ready to resume with the witness?

Mr. Williams: If it please the Court—I'm sorry.

Defendant Simmons: Your Honor, as far as the cross-examination, I prefer to cross-examine first, and if there is any situation concerning laws of the constitution or statutes or what not that prohibit my cross-examining first, I would like to know it, if I would be violating the law by asking, you know—request other than for you to just brush it aside and say, "I don't feel like dealing with this in a particular way." I feel that you should deal with it.

* * * * *

(1839) * * *

Mr. Clark: Objection.

The Court: Sustained.

Q. Do you feel that you are at a state of war with the black and poor people in general?

Mr. Clark: Objection.

The Court: Sustained. I think you have now reached well beyond the point where your questions are relevant, Mr. Simmons, that's probably enough. We have gone 50 minutes on this examination.

Any redirect?

Mr. Clark: Yes.

The Court: Before we do that——

Defendant Simmons: I don't appreciate the way you're cutting into this particular questioning. It takes me some time to establish a base, and I'm——

The Court: I'm trying to excuse the jury, and I would appreciate your——

Defendant Simmons: The way you have handled it so far with the funky shit that you pull with that jury—you might as well——

The Court: You're about to jeopardize your——

Defendant Simmons: I'm not about to go on with this case the way you're handling —standing mute.

(1840)

The Court: It may be you may be right, you won't go on. Would you please sit down so I can excuse the jury right now, or I will have the marshal escort you to your seat? Sit down, Mr. Simmons. Will you sit down right now, please, or the marshal will escort——

Defendant Simmons: You even have a clandestine meeting with the jury on the panel——

The Court: Please sit down and be quiet, right now.

Defendant Simmons: You are running the whole—

Defendant Alston: Judge Newman, go ahead with the lynching. See, we have got to do it now—we are at a point now where we——

The Court: Mr. Simmons, please sit down, please take your seat.

Defendant Simmons: All this shit——

The Court: The jury will take their midafternoon recess.

Defendant Simmons: I'm not going on with this secret bullshit.

(Jury excused at 3:40 p.m.)

The Court: Mr. Simmons, let me make it clear to you in the absence of the jury——

Defendant Simmons: You're upsetting me. I don't want to hear anything—what you have to say.

(1841)

The Court: When I tell you your examination is over, and if you cannot avoid language that you know perfectly well is not suitable for the courtroom, then your right to defend yourself is—will be at an end, and Mr. Clifford will resume.

Defendant Alston: This whole system ain't suitable to us.

The Court: Mr. Simmons, I want you to understand this, I think you do, it has come up several times, but the kind of outburst that just went on is not going to be repeated; if you don't feel you can contain yourself Mr. Clifford will resume.

During this recess, I suggest you and Mr. Clifford discuss what your future conduct is going to be, and we will decide then whether you are going to resume.

Defendant Simmons: Before you take that action, I want you to understand that I'm going to expose all that secret funky business that you had going on in this courtroom right in front of the jury; you might as well call a mistrial right now.

The Court: We will discuss it after the recess.

(Recess taken.)

(In the absence of the jury.)

Mr. Williams: Once again, I would like to renew my motion to sever the defendants in this case, in view of the events which transpired prior to the recess. I think that's clear that it's not possible for my client to obtain a fair trial under these (1842) circumstances of tension between the bench and one of the defendants, which seems to have come into being, and the various comments which were passed between the bench and one of the defendants in the presence of the jury, I think adversely affect my client's opportunity to have a fair trial.

The Court: Your motion for mistrial on that ground is denied.

Mr. Williams: It's a motion to sever.

The Court: It's denied.

Mr. Rosen: On behalf of Mr. Alston, I make the same motion, whether for severance and mistrial.

The Court: Your motion is denied.

Mr. Simmons, let me understand what the future course of your representation is going to be in this trial. Do you want to come up here a moment at the lectern, Mr. Simmons? Would you come up here to the lectern?

Now, there are two things I want to understand from you before we bring the jury back in. As I mentioned to you when you wanted to proceed to represent yourself, you could do that only so long as you abided by the normal rules of somebody who acts

in a representative capacity in the courtroom. I have some doubt at the moment, as I see you deliberately reading your notes while I'm speaking to you, whether you are able to do that, but I'm more concerned about two very specific matters:

* * * * *

(1855) * * *

The Court: It's not surprising. He is the only one who hasn't gone to a law school and had the rules of relevance drummed into him the way, I assume, you have and the other lawyers have.

Mr. Williams: That's true, but there is a distinction between telling someone a particular question is inappropriate——

The Court: Do you have a motion to make?

Mr. Williams: The motion is for a mistrial on the grounds of the fact that by limiting the length without regard to the questions, the nature of the questions themselves, by limiting the length of Mr. Simmons' cross-examination, the Court has demonstrated partiality in this case in front of the jury. I think it's unfair and I move for mistrial.

The Court: Motion is denied.

Bring the jury in.

(Jury entered courtroom.)

The Court: We are about to resume with the examination of this witness. Before we do that, I just want to express one caution to you. In connection with what occurred just before the recess, I am going to ask you very specifically to make every (1856) effort that you humanly can not to permit what occurred in the remarks between Mr. Simmons and myself to have any bearing whatever on your consideration of either his case or the case of the other

two defendants. When a person undertakes to represent himself, he takes on certain added pressures, and those pressures, on occasion, may prompt him to say something that is better unsaid, and I urge you to bear that in mind and to not permit what was said on that occasion to have any bearing on your decision with respect to the guilt or innocence to any of the defendants in this case. That's the central function you have, is to focus on those issues, and I want you to focus on those issues without any distraction that may divert your attention.

Redirect Examination by Mr. Clark:

Q. When you gave your statement on May 3rd, you stated that you described one of the people as being involved was—being a white male? A. Yes, I did.

Q. Was that man that you described as a white male the same as either one of the defendants that you have identified in court today? A. No, it's neither one of the defendants I identified in court here today, sir.

* * * * *

(2008)

Mr. Dow: There is——

Defendant Simmons: You can't do redirect until I finish my examination. I can't examine him——

The Court: Mr. Simmons, we are not going to have a——

Defendant Simmons: I'm going to shout and I'm going to scream and everything else until you allow me to finish cross-examining this witness.

The Court: If you don't take your seat instantly—

Defendant Simmons: I'll take my seat—like I told you before, I'll take the seat because the marshals have guns and the marshal with the automatic weapon up in the balcony and reinforcement outside,

that's the only reason I'm taking my seat, because I am unarmed.

The Court: Your right to represent yourself will end, if you don't sit down and be quiet instantly.

Defendant Simmons: I say again that the only way that he is going to——

The Court: You have just lost your right to represent yourself, Mr. Simmons.

Defendant Simmons: I'm tired, I'm sick and tired of playing your chess game for lynching. I'm sick and tired, so you might as well take that divine robe that (2009) you have and stick it up the best place—that you know that you can stick——

The Court: You will lose your right to remain in the courtroom if you don't stop.

Defendant Simmons: Allow me to finish cross-examining this witness, I'm trying to bring out from this witness—you want to use——

The Court: If you don't be quiet, you will be removed from the courtroom.

Defendant Simmons: It don't make no difference if I be removed from the courtroom, I want you to understand one thing, I'm going to defend myself, I want you to understand that, I want you to think—

The Court: I will give you one more warning. If you don't stop shouting, you will be removed from the courtroom.

Defendant Simmons: All right, just order me to be removed from the courtroom.

The Court: Are you able to contain yourself now?

Defendant Simmons: I'm able to walk out of the courtroom if you want me removed. I'm able to walk out of the courtroom.

The Court: Is there any redirect?

Mr. Dow: There is redirect.

(2010)

Defendant Simmons: No, no, no, no, no, no.

The Court: Marshal, please excuse Mr. Simmons from the courtroom.

A Voice: Right on, brother.

The Court: The young lady who just demonstrated, would the marshal please obtain her name?

Defendant Alston: Don't——

The Court: Marshal, please get—please ask the young lady her name.

Defendant Haskins: Get that marshal, hear. Crew-cut mad dog.

The Court: You can excuse her from the courtroom, but please ask her name.

Defendant Haskins: Let her go.

The Court: Mr. Haskins, if you can't control yourself, you will be removed.

Defendant Haskins: Grab me, fat boy.

Defendant Alston: You check him out, too.

Defendant Haskins: You gave these boys an order. You know these boys can't think for themselves. You don't tell them to be grabbing young lad[illegible] like that, he's a mad dog, he's liable to hurt that young lady.

The Court: If you don't sit down and keep quiet, you will be removed from the courtroom, as well. (2011) Please sit down or else you will be removed. Make up your mind right now what you're going to do. Sit down so we can resume.

Defendant Haskins: Just take it easy.

Defendant Alston: Stop provoking——

Defendant Haskins: Just take it easy.

The Court: If you do not sit down and be quiet, you will be removed.

Defendant Haskins: You got them.

The Court: Sit down.

Any redirect of this witness?

Mr. Dow: A few questions.

(Defendant Simmons was removed from courtroom.)

Redirect Examination by Mr. Dow:

Q. Mr. Silva, to clear up a point or two, the room that you were in, I believe you described it as your uncle's bedroom or sitting room? A. Bedroom.

Q. You were in that room for how long a period with the individual whom you identified? A. For about one hour—one hour with the individual.

* * * * *

(2023) * * *

The Court: Sit down and be quiet. The marshal will excuse Mr. Simmons again. We will take one more look at the situation in the morning, but we are not going to have these outbursts for the balance of today.

Are we ready for the jury?

Mr. Rosen: No, your Honor.

The Court: Just a minute. Mr. Haskins, where were you going?

Defendant Haskins: Are you going to tell them—because I'm not going to be here, either.

The Court: You prefer to leave the courtroom?

Defendant Haskins: Yes, I'm leaving right now.

The Court: Just a moment.

Defendant Haskins: Do you want us in or out?

The Court: Mr. Williams, have you had an opportunity to acquaint your client with his rights concerning remaining in the courtroom, as well as his right not to be in the courtroom?

Defendant Haskins: I have acquainted Mr. Williams of my intention.

Defendant Alston: We got no rights.

Mr. Williams: My client and I have discussed the matter, your Honor, and I frankly think that my client is very well aware of all of his rights.

(2024)

The Court: Mr. Haskins, it's very simple, you have two choices. You can either sit down, resume your seat and allow the trial to continue with you here, but there is no requirement that you remain here if you prefer to be outside the courtroom for the balance of the trial, I'm not going to force you to stay here. But I'm going to expect a decision to be made right away without a long speech, so if you wish to sit down and have the trial continue, do so.

Defendant Haskins: But you're going to give me one——

The Court: If you wish to leave, you may do so.

Defendant Haskins: I'm leaving. I was on my way out. I don't know why you stopped me.

The Court: All right. The marshals can escort Mr. Haskins out.

Defendant Haskins: Just call me Nat Turner.

Defendant Alston: Call me Malcolm X, H. Rapp Brown, anything but that slave name——

The Court: Leave him here just one instant.

Mr. Rosen, have you had a chance to make your client aware of his rights both to remain in the courtroom and his right to leave the courtroom if that's his preference?

Mr. Rosen: We discussed it, and I think Mr. Alston knows what the situation is in terms of his legal rights, and I saw him a minute ago and I am sure that he heard your Honor's colloquy with Mr. Haskins.

(2025)

Defendant Alston: You just don't know what to say. He wants to say something.

The Court: Mr. Alston, you have the same choice, you can either take your seat right now and be quiet and let the trial continue, or, if you prefer to leave the courtroom, you may do so.

Defendant Alston: Resign this practice—come on back tomorrow and——

The Court: You prefer to leave the courtroom?

Defendant Alston: I'm going.

The Court: All right. The marshal will then escort you out, as you have indicated you prefer——

Defendant Alston: I don't think there is any law that says spectators can't laugh, you know.

The Court: You have indicated you prefer to leave, and at least for the balance of today, you may be excused in accordance with your preference. The marshals will escort Mr. Alston out.

(Three defendants absent from courtroom at 4:25 p.m.)

The Court: Are counsel ready to resume?

Mr. Rosen: No, your Honor.

The Court: Let's get right to it. I have had to endure extended colloquy by others, but I do expect counsel to be right to the point.

(2026)

Mr. Williams: May I say that I take personal offense at that remark, I think it was utterly unjustified. I was about to address a simple point of law to your Honor, if your Honor thinks that there is something wrong with what—with the way I was standing before your Honor——

The Court: I have no quarrel with the way you stand, M.. lliams. To the extent I have had any-

thing to say about what you have done in this courtroom, I have made it very clear to you, so I just want you to understand now that if you have a legal position to make, I would like it made briefly, because the jury has now been waiting for about an hour for us to resume. So state the point that you rose to make.

Mr. Williams: It was my intention to say precisely what I will say now, which is very simple, that I move for a mistrial and severance of the defendants because I believe that my client has been hopelessly prejudiced by what transpired in the courtroom during the time that the jury was here just before our midafternoon recess.

The Court: Motion for mistrial is denied. The motion for severance is denied.

Mr. Rosen: On behalf of my client, I make the same motion for the same reasons.

The Court: All right. The motions in Mr. Alston's case for mistrial and for severance are denied.

* * * * *

(2029) * * *

The Court: Do you wish to recall Mr. Baker for cross-examination.

Mr. Williams: If your Honor is denying my motion to strike his testimony.

The Court: That motion is denied.

Mr. Williams: Then I ask he be recalled.

The Court: Are we ready for the jury? Does the government have a witness?

Mr. Clark: Yes.

Mr. Clifford: I take it your Honor will instruct the jury as to the absence of our clients?

The Court: Yes, I will surely bring it to their attention.

I am inclined not to go into very much detail about it, but simply to indicate to them what the current situation is.

Mr. Clifford: That's the question—we may not want you to mention it.

Mr. Rosen: With respect to my client—I'm not sure what the situation is with the others—I also ask the Court, because there was certainly an issue with respect to defendants being excluded from the courtroom by order of the Court, I ask the Court to make it clear to the jury that my client is absent from the courtroom on the basis of his own choice, not because he was barred from the courtroom by the Court.

(2030)

Mr. Williams: I would join in that in behalf of my client.

Mr. Clifford: I would join in that, also.

The Court: I am hesitating only to try to think what form of words best and fairly characterizes Mr. Simmons' situation. I don't think it's quite the same as Mr. Alston's and Mr. Haskins'. There is no question that they prefer to leave and said so.

Mr. Clifford: I think Mr. Simmons' reply to your Honor—the option he exercised was a desire to leave. He didn't express it in those words quite.

The Court: That may be putting a somewhat favorable cast on it, but I suppose it would be best not to endeavor to draw distinctions for the jury, so I will instruct them as you request.

(Jury entered courtroom at 4:30 p.m.)

The Court: Ladies and gentlemen, I'm sorry that you were delayed somewhat through this extended recess.

Let me first re-emphasize the point that I made to you at the end of the recess yesterday, that any occurrences of an untoward nature that occur in the courtroom should

not be permitted to distract you from giving your attention to the issues in this case.

Now, since you were last seated in the courtroom, two developments have occurred which I should bring to your attention. (2031) The first is that Mr. Simmons is no longer representing himself pro se pursuant to a Court ruling; and all three of the defendants, at least for now, have exercised their right to be absent from the courtroom.

Now, whether that situation will continue, I don't know, but at least for now, the situation is: as you can plainly see looking at counsel table, that their lawyers are here. Mr. Clifford, who was identified to you at the very outset of this trial as representing Mr. Simmons, and was then reintroduced in a sense as being in an advisory capacity only, is now resuming his role as Mr. Simmons' counsel, and the trial will continue, and we are now ready for the presentation of further evidence.

But I again urge you very seriously not to let developments of this sort distract your attention from the issues in the case, and not to speculate about why things occur and not to draw any inferences one way or the other about these particular developments. I brought them to your attention just so you would know what the fact is, and by bringing them to your attention, I do not mean in any way to have those considerations affect your determination of the issues in the case. Quite the contrary, they should play no part at all. So we will now resume the trial, and the government can call its next witness.

* * * * *

(2435)

In short, there is not a scintilla of evidence in this record that the capacity of the attorneys who represent the defendants in this case was in any way interfered with. There is simply a total absence of proof of the slightest interference with the attorney-client privilege.

Even in cases where there was a far more substantial claim, such as Raymore against United States at 411 Federal 2nd 30, and Hawes against the United States 344 Fed. 2nd 56, claims respecting the dismissal of an indictment were rejected and on this record, the claim is far less substantial, indeed, it's nonexistent. It's a frivolous claim, and the claim to—the motion to dismiss the indictment is denied.

Mr. Rosen: There is one brief matter. This relates to the issue of wire tapping on which the government filed a response, which I received a copy of. That response does not reflect any inquiry, if inquiry was made, to the New York City Police Department, which is something of a concern to us, because, in part, there has been evidence reflecting some involvement of the New York City Police Department in this case. Therefore, I would ask the Court to reserve decision on our motion concerning wire tapping pending some kind of report from the government on inquiries made of the New York City Police Department.

The Court: The only thing I recall that had anything representing the New York City Police Department, is that they supplied some photographs. There is no indication that they are (2436) part of the prosecution of this case. There was a good bit of evidence of cooperation between the Connecticut authorities and the federal authorities, but I'm not aware of any indication that New York is in any sense part of this prosecution other than as a source of photographs.

Mr. Rosen: There was some reference to their cooperation and that I remember their providing photographs as one item of cooperation in the prosecution and in the investigation of the case, and it seems to me under Alderman against the United States, that even that minimal showing may not be necessary, although I think it perhaps is necessary to make some showing because they—the prosecution cannot be expected to search the records of every law enforcement agency in the world, but where, as here, the

New York City Police Department plainly was in contact with investigating authorities, and plainly played some role, it seems to me there is enough of a threshold pass to make inquiry relevant, and under Alderman, the extent of the inquiry ought to be left to defense counsel.

* * * * *

(2438) * * *

Mr. Williams I don't mean they took the position they had. They acknowledge, I think, that the New York City Police Department has been deeply involved in the investigation of the organization of which our clients are members, and that that is an agency which is certainly a more likely one to contact than the Internal Revenue Service, which apparently they did contact.

Mr. Clark: I have no personal knowledge of the extent of the New York City Police Department investigation of the subjects or in the organization to which they may belong. I further think that with respect to inquiry of the New York City Police Department, I don't think that there is even any basis by which we can compel reply from the New York City Police Department. If we were to send them a letter and ask them to reply to this, I think they could tell us that they won't respond. So I just don't—this does catch me a bit by surprise, and I don't have case authority, but——

The Court: Was the New York Police Department the source of any evidence in this case, other than the photographs that were used in the pretrial identification process?

Mr. Clark: Not to my knowledge, your Honor. There may have been—not to my knowledge. Especially, there is no evidence that the government presented that came by way of New (2439) York City Police Department. I know that for a fact.

Mr. Rosen: That, I think, is not the—it's not the time or the place to make that determination and form in which

Mr. Clark is necessarily limited in responding, being as he is the presenter of the evidence, but not the gatherer of the evidence. That response, I don't think, can dispose of our claim, and I repeat, we are not looking here for wholesale inquiry into any large number of agencies or asking the government to discover agencies and make investigation. We are concerned with one agency, which whether or not in the government's view, certainly in our view, is probably the most likely to be involved in illegal wire tapping of our clients.

Mr. Williams: I join fully with what Mr. Rosen has said, but I want to say that with respect to the question of whether evidence concerning this case has been gathered by New York City Police Department, that I will represent to this Court as an officer of this Court, that it has been specifically told to me in a personal interview by a uniformed member of the New Haven Police Department that prior to the bank robbery which is the subject of this prosecution within a relatively short time not to exceed about a month, that a teletype was received in the New Haven Police Department from the Connecticut State Police Department, which stated that they had received information from the New York City Police Department that members of the Black Liberation Army were planning to conduct a bank robbery of some * * *

★ U. S. Government Printing Office 1975— 614—236—302

United States Court of Appeals

FOR THE SECOND CIRCUIT

No.74-2493,94,95

UNITED STATES OF AMERICA

Appellee

v.

HAROLD SIMMONS, JAMES HASKINS,
and MICHAEL ALSTON

Defendant-Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 17th day of March, 1975, deponent served the within Brief upon John Williams, 265 Church St. New Haven, Conn.

David Rosen, 265 Church St, New Haven, Conn.

Mr. Harold Simmons, C/O Hartford Correctional Center, Hartford, Conn.
Federal Public Defender, 770 Chapel St. New Haven, Conn,.

Attorney(s) for the Appellants in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 17th day of March 1975

Harold Silberzweig

HAROLD SILBERZWEIG
Notary Public State of New York
No. 30-8995450
Qualified in Nassau County
Commission Expires March 30, 1976